IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2886 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

1 to 5 - No

RAISINGBHAI KALAJIBHAI

Versus

DISTRICT SUPERINTENDENT OF POLICE

Appearance:

MR NALIN K THAKKER for Petitioner

MR VM PANCHOLI, AGP for Respondent No. 1, 2

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 03/08/1999

ORAL JUDGEMENT

In this petition under Article 226 of the Constitution, the petitioner has challenged the order dated 26.6.1991 (Annexure "D") passed by the District Superintendent of Police, Panchmahals dismissing the petitioner from service on the ground that the petitioner was convicted by the learned JMFC, Panchmahals in Criminal Case No. 588/90 under Section 145 of the Bombay Police Act.

2. The petitioner was appointed as an unarmed police constable on 25.10.1996. The petitioner was promoted as unarmed Head Constable Grade-II and posted as Zalod Police Station in February, 1987. On 18.4.1990 at 6.00 P.M. the petitioner handed over the charge to Head Constable Vakhatsinh Bhavansinh of Zalod Police Station and proceeded on medical leave for 51 days from 19.4.1990 to 8.6.1990 i.e. for 51 days, but without obtaining prior permission. The DSP issued show cause notice dated 8.6.1990 (Annexure "A") calling upon the petitioner to show cause as to why the departmental penalty should not be imposed upon the petitioner for remaining absence without prior permission for the aforesaid period of 51 days and why the period in question should not be treated as leave without pay. After considering the petitioner's reply, the DSP passed order dated 13.7.1990 (Annexure "B") holding that the petitioner had committed misconduct of remaining unauthorisedly absent for 51 days and had also produced a doubtful medical certificate. Hence, the DSP passed order dated 13.7.1990 treating the period as leave without pay from 19.4.1990 to 8.6.1990 and also imposed penalty of Rs.300/-. It appears that on the same set of facts, the petitioner was thereafter prosecuted under Section 145 of the Bombay Police Act. In the said proceedings the petitioner stated that he was sick and he handed over the charge to Vakhatsinh and that he had also produced the medical certificate. The learned JMFC convicted the petitioner under Section 145(2) of the Bombay Police Act and imposed the fine of Rs.100/-. On the basis of the said order of the Criminal Court, the DSP passed the impugned order dated 26.6.1991 dismissing the petitioner from service.

It is the aforesaid order which is under challenge in the present petition.

3. Mr NK Thakker, learned counsel for the petitioner has challenged the aforesaid order of dismissal on the following grounds :-

(i) The DSP had earlier already held departmental proceedings against the petitioner on the same set of facts as per show cause notice dated 8.6.1990 (Annexure "A") and after hearing the petitioner, the DSP had already passed the order dated 13.7.1990 (Annexure "B") treating 51 days of absence as leave without pay and also imposing a penalty of Rs.300/-. The conviction order passed by the learned JMFC dated 20.2.1991 in Summary Case No. 558/90 under Section 145(2) of

the Bombay Police Act was on the same set of facts. Hence, the said conviction order cannot furnish a cause of action for passing the second order of penalty by way of disciplinary proceedings.

(ii) Even otherwise, the impugned order suffers from the vice of disproportionality as the petitioner was in service since 1966 and the petitioner's 24 years service was to be wiped out by the impugned order without considering the fact that the period of absence was already regularized by the DSP earlier by treating the absence as leave without pay.

4. On the other hand, the learned AGP for the respondents has submitted that the petition suffers from delay, laches and acquiescence as the order passed in 1991 has been challenged in this petition filed only in the year 1994.

Secondly, it is submitted that the petitioner has an alternative remedy of filing an appeal before the higher departmental authority.

Thirdly, it is submitted that in view of the proviso (a) to clause (2) of Article 311 of the Constitution, an order of departmental punishment can be passed on the basis of an order of conviction by the Criminal Court without holding an inquiry and, therefore, the impugned order was passed in accordance with law.

5. Having heard the learned counsel for the parties, it appears to the Court that while there is some delay in challenging the impugned order in as much as the order was passed in June, 1991 and the petition is filed in February, 1994, the explanation offered by the petitioner in the petition is the financial constraints. As per the settled legal position, the writ jurisdiction under Article 226 of the Constitution is a discretionary jurisdiction and if in the facts and circumstances of a case, the Court finds that the impugned action was highly arbitrary and illegal and it caused serious injustice to the petitioner and that entertaining the petition after delay would not cause any prejudice to the respondent authorities, the Court may exercise the discretion and entertain the petition taking appropriate care while moulding the relief. In the facts and circumstances of the case and subject to the rider aforesaid, the Court entertains the petition on merits.

6. The same may be said about the second preliminary contention about availability of a departmental appeal. This petition was admitted in March, 1994. Hence, after a lapse of more than 5 years, this Court does not propose to relegate the petitioner to the alternative remedy of an appeal, more particularly when no inquiry into disputed question of fact is required to be held by this Court and the Court proceeds on the basis of the facts which are already on record.

7. Coming to the merits of the matter, it is undisputed that the DSP had earlier passed the order dated 13.7.1990 pursuant to the show cause notice dated 8.6.1990 calling upon the petitioner to show cause why departmental action should not be taken against the petitioner for the unauthorized absence from 19.4.1990 to 8.6.1990. The petitioner had resumed duty on 8.6.1990 with medical certificates. The allegation in the chargesheet was only that the medical certificates produced by the petitioner were doubtful. However, taking into consideration the petitioner's reply dated 8.6.1990, the DSP passed the order dated 13.7.1990 treating the period of absence as leave without pay and also imposing the penalty of Rs.300/-. Once the DSP had proceeded against the petitioner departmentally in connection with the aforesaid misconduct, merely because thereafter the petitioner was convicted under Section 145 of the Bombay Police Act, it would not furnish a fresh cause of action to the departmental authorities for again taking departmental action against the petitioner, when the previous order of departmental penalty was not reviewed. Sub-section (2) of Section 145 of the Bombay Police Act for which the petitioner is convicted reads as under :-

> "(2) Any police officer who (a) is guilty of cowardice, or (b) resigns his office or withdraws himself from duties thereof in contravention of section 29, or (c) is guilty of any wilful breach or neglect of any provision of law or any rule, or order which as such police office, it is duty to observe or obey, or (d) is guilty of any violation of duty for which no punishment is expressly provided by any other law in force, shall, on conviction, be punished with imprisonment for a term which may extend to three months or with fine which may extent to one hundred rupees or with both."

A bare perusal of the chargesheet dated 8.6.1990 (Annexure "A") and the order of conviction passed by the

learned JMFC (Annexure "C") leaves no room for doubt that the first order of penalty was passed on the same set of facts which constituted the offence for which the petitioner was convicted and, therefore, the respondents had no authority to initiate another departmental inquiry or to pass another order of penalty merely on the basis of the order of conviction. On this ground alone, the impugned order deserves to be set aside.

8. The next question is what relief should be granted to the petitioner. Since the order of dismissal is held to be illegal, the petitioner shall have to be reinstated in service with continuity of service.

9. The learned counsel for the petitioner urges that since the order is held to be illegal, the petitioner also be paid backwages since the impugned order is found to be without authority. In the alternative, the learend counsel for the petitioner placed reliance on the decisions of this Court in Varsinh Bhagwan vs. State of Gujarat, 1992 (2) GLH 311 and on the full context of the judgment dated 5.7.1985 rendered by this Court (Coram: Mr Justice AM Ahmadi, as His Lordship then was) in Special Civil application No. 197/79 only a part of the judgment is reported in Sardarsingh Devesingh vs. The District Superintendent of Police, Sabarkantha District & Ors., 1985(2) GLR 1368.

10. The learned AGP has vehemently opposed the said request and has submitted that no backwages should be awarded to the petitioner.

11. As far as the period from the date of the petitioner's dismissal from service (20.6.1991) till the date of filing of the petition (1.3.1994) is concerned, obviously since the petitioner himself was responsible for the said delay, no backwages can be awarded to him.

12. Now the question is whether the petitioner should be paid any backwages for the period from the date of filing of the petition till the date of reinstatement. Here also, in view of the fact that the Court is exercising discretionary jurisdiction and the departmental proceedings were taken by the respondent authorities on account of the petitioner, an employee in the police force, having remained absent for a period of 51 days without informing the department in advance and also in view of the fact that the DSP himself had earlier mentioned the proposed penalty in the show cause notice dated 8.6.1990 (Annexure "A") which prompted the petitioner to accept the proposed penalty as per his

reply to the show cause notice (a copy of the reply has been produced at the hearing of this petition) and in view of the principles laid down in the aforesaid two decisions of this Court, this Court would award only 40% of the backwages to the petitioner for the period from the date of filing of the petition (i.e. 23.2.1994, which date shall be taken as 1.3.1994 for the convenience of calculation) till the date of the petitioner's reinstatement.

13. The petition is, therefore, partly allowed. The impugned order dated 26.6.1991 at Annexure "D" to the petition is quashed and set aside. The respondents shall reinstate the petitioner in service with continuity of service within one month from the date of receipt of the writ of this Court or a certified copy of this judgement, whichever is earlier. The respondents shall pay the petitioner 40% of the amount of arrears of salary and allowances for the period between 1.3.1994 till the date of reinstatement within three months from the date of receipt of the writ of this Court or a certified copy of this judgment, whichever is earlier, failing which the amount shall carry interest at the rate of 12% from the date of expiry of the aforesaid time limit.

It is clarified that the petitioner shall be given the benefit of seniority and pay fixation on the basis that the petitioner was in continuous service without any break from 26.6.1991 till the date of his reinstatement.

14. Rule is made absolute to the aforesaid extent with no order as to costs.

Sd/-

August 3, 1999 (M.S. Shah, J.)

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